

¹ An Award was entered in this claim on June 29, 2007. The Award granted claimant benefits for a May 24, 2005 accident and bilateral upper extremity injuries.

extremity injuries against Midwest Bulk, Inc., and American Interstate Insurance Company (American Interstate) with a claimed date of accident of May 14, 2009, and each day thereafter.

In the December 10, 2009 Order, ALJ Clark found claimant was injured while working for Midwest Bulk, Inc. (Midwest). The ALJ also found that the date of accident was April 7, 2009, the date claimant returned to Dr. J. Mark Melhorn, who had performed carpal tunnel surgery on claimant in 2005. The ALJ authorized Dr. Melhorn as claimant's treating physician and ordered all medical paid.

Midwest and American Interstate contend claimant failed to prove his upper extremity injuries arose out of and in the course of his employment with Midwest. In support of that contention, they argue claimant's testimony and the records of Dr. Melhorn establish claimant's upper extremity symptoms were the same problems he had been experiencing since 2005.

If claimant has established he sustained a compensable injury, Midwest and American Interstate maintain claimant failed to provide timely notice to Midwest as required by K.S.A. 44-520 as they allege claimant did not notify Midwest that he had been injured. Regarding timely written claim, Midwest and American Interstate argue claimant offered no evidence or proof that he served written claim to Midwest. In addition, Midwest and American Interstate argue that claimant's December 30, 2009 deposition, taken 20 days after the issuance of the ALJ's Order, is not part of the record and should be disregarded by the Board on review. Midwest and American Interstate request the Board to reverse the December 10, 2009 Order and find claimant has failed to establish his entitlement to workers compensation benefits.

Custom Polishing Pros and its insurance carrier, Travelers, did not file a brief in this matter. However, at the December 10, 2009 Post-Award Medical and Preliminary Hearing, they requested that post-award medical benefits be denied and that liability be assessed against Midwest.

Claimant contends his upper extremity injuries arose out of and in the course of his employment with Midwest. Claimant asserts that after May 2006, when he last treated with Dr. Melhorn for upper extremity injuries sustained while working for Custom Polishing Pros (Custom) in 2005, he did not receive or request medical treatment for his upper extremities until early 2009 while he was working for Midwest.

With regard to timely notice, claimant maintains that he was under the impression that Custom was responsible for treatment; that June 24, 2009, is the first date he was

made aware by his doctor that his work activities for Freight Logistics²/Midwest contributed to his upper extremity problems; and that June 24, 2009, is the date he became aware he should give notice to his employer. Claimant represents June 24, 2009, was the date his counsel received a copy of Dr. Melhorn's June 12, 2009, letter, wherein the doctor stated claimant's current condition was a combination of original symptoms and current work activities (which claimant contends refers to his work activities with Midwest). Claimant asserts he provided notice on August 12, 2009, and indicates he had just cause for failing to provide notice within 10 days.³ Claimant contends his attorney provided written claim within 200 days of his accident and that the written claim was provided on August 12, 2009, to Freight Logistics and on October 15, 2009, to Midwest. Claimant maintains he has sustained his burden of proof and that he is entitled to the benefits ordered by the ALJ.

The issues before the Board on this appeal are:

1. Whether claimant sustained an accidental injury that arose out of and in the course of his employment with Midwest Bulk, Inc. or Custom Polishing Pros.
2. If claimant sustained a compensable accidental injury, did claimant provide timely notice of such injury?
3. If claimant sustained a compensable accidental injury, did claimant provide timely written claim?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' arguments, the Board finds and concludes:

Claimant began working for Midwest Bulk, Inc., in August 2008 and continued working there until sometime in April or May 2009.⁴ Claimant's work for Midwest partly consisted of loading grain trucks and pulling tarps back and forth over the grain. Claimant testified the rolling of the tarps (claimant indicated he rolled the tarps on approximately eight to ten trucks, and sometimes twelve trucks, a day) caused his bilateral upper extremities to hurt. The pain commenced about six months after claimant began working for Midwest.

² Claimant's counsel represents in claimant's brief to the Board that Freight Logistics and Midwest are owned by the same person and that claimant's counsel has been notified the correct employer is Midwest.

³ See K.S.A. 44-520.

⁴ P.A.M. and P.H. Trans. (Dec. 10, 2009) at 24.

Claimant initially sustained injuries to his bilateral upper extremities while working for Custom Polishing Pros in 2005. This resulted in a workers compensation claim (Docket No. 1,021,032), which was litigated to an Award. The authorized treating physician, Dr. J. Mark Melhorn, provided treatment including surgery and released claimant in 2006.

Claimant worked several different jobs between his employment with Custom and Midwest. Claimant testified that during this time his symptoms may have been better but there was still some discomfort and problems.⁵ The pain to his bilateral upper extremities increased after he had been working for Midwest for six months.

The claimant returned to Dr. Melhorn on April 7, 2009, complaining of sharp pain in the joints of all his fingers. Dr. Melhorn conservatively treated the claimant in April, May and June 2009.

In a letter dated June 12, 2009, to Custom and Travelers' attorney⁶ Dr. Melhorn opined: "[H]is [claimant's] current ulnar nerve entrapment has a combination of original symptoms for which treatment was provided in 2005 and current work activities."⁷

This letter was the first indication from Dr. Melhorn that he attributed claimant's upper extremity problems in part to his work activities with Midwest.

Dr. Melhorn scheduled surgery for claimant's right and left upper extremities. Custom's insurance carrier would not authorize the surgery so claimant requested a post-award medical hearing.

In the December 10, 2009 Order, the ALJ found claimant sustained accidental injury while working for Midwest. The claimant's testimony and Dr. Melhorn's medical opinion support the finding. The ALJ found the date of the accident was April 7, 2009.⁸ He further implicitly found notice and written claim were timely. The Board agrees notice and written claim were timely. However, the Board determines a different date of accident.

Midwest and American Interstate contend the claimant failed to provide timely notice and timely written claim pursuant to K.S.A. 44-520 and K.S.A. 44-520a.

⁵ *Id.*, at 23.

⁶ Claimant was not cc'd on this letter.

⁷ P.A.M. and P.H. Trans. (Dec. 10, 2009), Resp. Ex. 1.

⁸ This is the date claimant returned to Dr. Melhorn after last seeing him in 2006.

To determine if notice and written claim are timely the date of the accident must be determined.

Based on the evidence, the Board finds claimant's accident occurred as a result of a series of events and repetitive use while working for Midwest. Pulling tarps back and forth on approximately eight to twelve trucks a day constitutes a series of events and repetitive use as contemplated by the statute.

When an accident occurs as a result of a series of events one must look to K.S.A. 44-508(d) to determine the date of the accident.

In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.⁹

The plain language of the statute states that when an accident occurs due to a series of events or repetitive use and the employee is not taken off work or restricted from performing the work that caused the injury by the authorized physician, the date of the accident is the date the employee gives written notice of the injury to the employer or the date the condition is diagnosed as work related (provided that fact is communicated in writing to the injured worker), whichever is earliest. Claimant was not taken off work nor restricted from performing his job duties by an authorized physician. Nor is there evidence that claimant was notified in writing that his condition was related to work performed while working for Midwest.

⁹ K.S.A. 2009 Supp. 44-508(d).

Accordingly, the date of accident is October 14, 2009, the day claimant provided written notice of the accident to Midwest.¹⁰ The written claim is dated October 15, 2009. Hence, notice and written claim are timely.

The ALJ's Order is affirmed in part and modified as to the date of accident.

CONCLUSION

Claimant sustained injury that arose out of and in the course of his employment with Midwest. Notice and written claim were timely. The date of accident is October 14, 2009.

WHEREFORE, the Board affirms in part and modifies in part the December 10, 2009 Order entered by ALJ Clark. The date of accident is modified to be October 14, 2009.

IT IS SO ORDERED.

Dated this ____ day of March, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas M. Warner, Jr., Attorney for Claimant
William L. Townsley, III, Attorney for Custom Polishing Pros and Travelers
Terry J. Torline, Attorney for Midwest and American Interstate Insurance Company
John D. Clark, Administrative Law Judge

¹⁰ October 14, 2009, is the date of the letter claimant sent to Midwest by certified mail regarding his injuries. The signed receipt is not dated so the date of the letter is deemed the date of accident.